UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 687

Case No. 737: CURE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas at the request of Daniel Cure, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 28 February, 31 May and 31 July 1993;

Whereas, on 29 June 1993, the Applicant filed an application, requesting the Tribunal, inter alia:

"...

(a) to re-examine the decision of the Secretary-General to

(i) deny to the Applicant for a period of two years the eligibility for within-grade increment; and

(ii) demote the Applicant to the first step of the grade below his actual one;

(b) To find that, in spite of the Applicant's repeated efforts to clarify the case, facts have been distorted during the investigations;

(c) To order the Respondent to reinstate the Applicant retroactively in his previous grade, including any pending annual salary increments, and restore him in his administrative career;

(d) To order the Respondent to remove from the records all and any reference that the Applicant's actions caused any friction, embarrassment or brought the Respondent into disrepute with the host government."

Whereas the Respondent filed his answer on 11 March 1994;

Whereas the Applicant filed written observations on 8 August 1994;

Whereas the Applicant submitted an additional document on 16 September 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 November 1970, as a Personnel Officer at the P-3 level, on a probationary appointment, and was assigned to the Economic Commission for Latin America and the Caribbean (ECLAC) in Santiago, Chile. His appointment became permanent on 1 November 1972. On 1 August 1976, the Applicant was promoted to the P-4 level. With effect from 1 September 1976, he was named Acting Chief, Personnel Section. On 12 January 1979, the Applicant was appointed Chief of the Section. On 1 January 1980, he was transferred to Headquarters. On 1 April 1983, he was promoted to the P-5 level and transferred back to Santiago, to serve again as Chief of the Personnel Section.

On 27 September 1991, a draft report by the Importation Committee dealing with "duty-free importation irregularities by two staff members in 1989-1991" was transmitted for comments to the Applicant and to his wife, who was also an ECLAC staff member. The letter of transmittal noted:

"In the context of a verbal complaint by the Chilean Foreign Ministry, about 'abuses' by ECLAC staff of the duty-free importation provisions, the Ministry cited as an example

> the recent importation by [the Applicant] of alcoholic beverages and cigarettes under custom release No. 91/243. The Executive Secretary has asked us to examine the matter."

On 24 October 1991, the Applicant sent his comments on the draft report. On 29 October 1991, the Importation Committee submitted its final report to the Executive Secretary. On 18 December 1991, the Executive Secretary wrote to the Applicant, listing his import of alcoholic beverages and cigarettes during various periods in 1990 and 1991, with the comment that these importations

> "... which were in excess of the ECLAC limits and with partial and no prior internal requests, are viewed as severe deviations from the ECLAC rules ... [and] appear to demonstrate repetitive and deliberate disregard on your part of the ECLAC rules established by the Executive Secretary with respect to duty-free importation privileges. They also appear to show that you acted in concert with your wife, in that you both took advantage of the position of trust which she enjoyed as Shipping Clerk responsible for the secretarial work of the Importation Committee and for the preparation of ECLAC's customs clearance forms ..."

The letter also referred to the import of a 29" TV set as

> "deviating from the internal ECLAC importation rules in (i) exceeding the TV size-limits provided in these rules; and (ii) effecting the importation without requesting the internal approval required under the rules."

On 24 January 1992, the Applicant submitted his response to the allegations, portions of which read as follows:

> "...3. I have never purposefully tried to circumvent the regulations and procedures of the Committee, either on my own or through my wife, nor have I ever imported or tried to import any items which I believed I would be forbidden to import by the Committee, as exceptions are granted to the internal regulations so long as the quotas dictated by the Chilean Government are respected. On the three occasions in which I requested an import over the ECLAC internal limits, I had no reason to believe I could not have obtained an exception from the Committee for the imports ...

...9. To understand why I paid so little attention to the submission of revised requests for import, I believe it is important to state for the record that an 'informal' set of rules or practice has developed and grown around the 'formal' internal rules of the Import Committee. One aspect of this 'informal' system is the 'borrowing' of the unused or under-used quotas of other international staff members for the purpose of keeping the internal limits set by the 'formal' internal rules of the Committee, at least on paper.

...25. In sum, I regret not having been as careful as I should have been in ensuring that any requests for the importation of goods was submitted to the Committee. All the requests were dutifully entered in my file by the Secretary of the Committee (my wife), with no attempt made to keep requests 'off the record' ... Despite the fact that I was not as careful as I should have been in following up revised requests, or asking for exceptions when I should have, the reasons were poor planning and lack of attention, not any purposeful manipulation of records or any attempt made to circumvent the Committee."

On 27 February 1992, the Office of Human Resources Management at Headquarters informed the Executive Secretary of the Secretary General's decision to refer the allegations of misconduct to a Joint Disciplinary Committee (JDC). On 6 April 1992, the Applicant was so informed. The JDC adopted its report on 19 June 1992. It concluded and recommended as follows:

"IV. Conclusions

11. ... the Panel finds that the importations ... did indeed violate internal ECLAC regulations in the manner specified and that the general charge ... has been substantiated.

12. The Panel takes note of the following mitigating circumstances:

(a) There is no evidence that the staff member sought to profit monetarily by his acts; on the contrary, there is reason to believe that the staff member is often disorganized and forgetful, and that these traits, coupled with a lack of attention to detail, were contributory factors.

(b) Evidence put forward during the hearings regarding the practice of 'quota swapping' or 'quota gifting' would appear to support the view that the staff member might

conceivably have chosen to import under another staff member's quota if he had deliberately set out to exceed his own quota.

(c) The staff member appears to have relied heavily upon his wife to follow the required procedures. This attitude is all the more understandable in view of the fact that his wife could reasonably be expected to know exactly what steps were required, since her official duties included maintaining an updated file on each staff member's importations, comparing import request forms submitted by staff against the above-mentioned file to ensure that they remained within the established quotas, preparing and processing documentation relating to such imports for the approval of the ECLAC Import Committee, and preparing and submitting the corresponding documentation for the approval of the Ministry of Foreign Affairs of Chile. In this connection, the Panel also notes, however, that the import privileges --and, hence, the responsibility of ensuring that those privileges were not abused-- were the staff member's, not his wife's; therefore, the staff member's reliance on his wife in this connection does not exempt him from a substantial degree of responsibility in the matter.

13. The Panel also takes note of the following aggravating circumstances:

(a) The staff member appears to have taken advantage of his wife's particular position within the Organization to place himself above the rules governing staff import privileges.

(b) The reiterative nature of the infringements of the ECLAC rules concerning import privileges forms a pattern which strongly supports the contention that the staff member has exhibited a deliberate disregard for those rules ...

V. Recommendations

14. In the light of the above considerations, the Panel finds that the staff member took advantage of his wife's position in the Organization to infringe the internal ECLAC regulations governing the use of import privileges and therefore recommends that the Secretary-General issue a written censure and that the staff member be fined US$750."

On 3 August 1992, the Under-Secretary-General for Administration and Management transmitted the JDC report to the Applicant and informed him as follows:

"The Secretary-General ... has concluded that your conduct constituted a serious violation of the UN standards of conduct and integrity and was of such a nature as to bring the Organization into disrepute in the host country.

The Secretary-General has given careful consideration to the mitigating and aggravating circumstances listed by the Committee. He has also taken into account the fact that, at all relevant times, you were Chief of Personnel in ECLAC and that, as such, you must be held to standards of conduct commensurate with your rank and responsibilities.

Pursuant to the Secretary-General's discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to demote you under staff rule 110.3(a)(vi) to the first step of the prior grade, with a two-year deferment of eligibility for within-grade increment, under staff rule 110.3(a)(iii) effective from the date of this letter."

On 29 June 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. No act has occurred that may be considered as unsatisfactory conduct as defined by United Nations staff rule 110.1, merely because the Applicant did not invariably follow internal ECLAC importation rules. Internal ECLAC rules are not part of the United Nations Staff Rules.

2. There is no evidence to confirm the statements of the Respondent that the host Government ever complained about the Applicant, verbally or in writing. The Applicant never exceeded the limits of duty-free importations authorized by the Government, and any communication from the Government concerning the Applicant should have been shown to him in accordance with administrative instruction ST/AI/292 on handling adverse material.

Whereas the Respondent's principal contentions are:

1. Establishment of internal duty-free importation rules for ECLAC officials was within the authority of the Executive Secretary.

2. Repetitive and deliberate disregard by the Applicant of these rules constituted conduct which fell short of the highest standards of integrity required from staff members under the Charter. That misconduct justified imposition of a disciplinary measure.

3. The Secretary-General's decision to demote the Applicant, with a two-year deferment of eligibility for within-grade increment, and to refuse to accept the JDC's recommendation for a written censure and a fine was a valid exercise of his discretion to impose a suitable disciplinary measure in the light of his assessment of the misconduct.

The Tribunal, having deliberated from 18 October to 11 November 1994, now pronounces the following judgement:

I. While the facts in this case are not in dispute, there is controversy regarding every other aspect. The Applicant asserts that whatever he did, even if wrong, was done in good faith and without any intention of violating the norms of importation for duty-free goods. The Respondent, on the other hand, sees a systematic pattern of wrong-doing in the Applicant's activities. The Applicant claims that he did nothing to disregard the laws of Chile, while the Respondent insists that the Applicant was obliged to observe scrupulously the provisions promulgated by ECLAC, having accepted them as terms of his appointment. The Applicant contends that the complaint of the Government of Chile, if in fact it was made, related to other importations by ECLAC staff. There was no ground for any objection to the imports made by the Applicant. Finally, the Applicant considers that the procedure followed in punishing him was flawed in many respects and showed a prejudice on the part of his supervisor. The Respondent seems to hold that, far from this being so, much of the trouble was due to the implicit

trust placed in the Applicant's wife, who was responsible for obtaining clearance for the Applicant's requests for duty-free imports. There are also other contradictions in the views of the parties.

II. The Tribunal notes that the Joint Disciplinary Committee (JDC) examined with care all aspects of the conflicting claims and counter-claims. It concluded that the Applicant was delinquent in his activities, that he sometimes imported goods much in excess of his entitlement, that at other times he did not apply for permission to import at all and that in still other instances, having obtained permission, he then imported more than had been permitted. In the circumstances, the Tribunal sees no need to re-examine the facts already scrutinized by the JDC. It will confine its judgement to some of the legal issues raised by the parties and to the question of whether the action taken by the Respondent was justified.

III. The first legal issue is whether the Applicant was bound to comply with the rules made by ECLAC for the importation of goods, rather than by the standards set forth by the Government of Chile. The Applicant contends that inasmuch as the rules promulgated by ECLAC were not formally approved by the General Assembly of the United Nations, they could not be considered as part of the Staff Rules and Regulations, and therefore the procedures for disciplinary action under Chapter X of these Rules and Regulations could not be applied. At the same time, the evidence shows that the Applicant was aware of the system established by ECLAC to control the import of duty-free goods and that the Applicant made efforts to adhere to the requirements of this system, despite the JDC's impression that the Applicant was "often disorganized and forgetful". Staff rule 110.1 prescribes that a staff member is to "comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules and other relevant administrative issuances." The Tribunal has little doubt that the "Reglamento de Importación" introduced by ECLAC is such a relevant issuance,

irrespective of whether or not it was pursuant to an agreement between the Government of Chile and ECLAC. The Applicant cannot escape the obligations imposed by the ECLAC internal regulations by arguing that they were not approved directly by the General Assembly. Subsidiary organs frequently have their own rules and regulations, which are applicable to all their staff members, provided, of course, that they are made known in advance. There is no doubt in this case that the Applicant knew what was expected of him and did in fact generally follow the regulations; when he did not or could not or would not, he apologized or tried to explain away such lapses.

IV. In these circumstances, the Tribunal finds that any staff member of ECLAC is bound by ECLAC regulations and cannot take shelter, when accused of violating these regulations, by arguing that his actions did not violate the terms of an agreement between ECLAC and the Government of Chile. The Tribunal notes, however, that the Respondent's contention that the Applicant had, by his activities, strained relations between ECLAC and the Government of Chile appears not to be altogether well founded.

For this reason, the Tribunal has some hesitation in accepting that the Applicant's conduct was, by itself, of such a nature "as to bring the Organization into disrepute in the host country." The record does not adequately support this conclusion. It is clear to the Tribunal that the infringements complained of by the Government affected a much wider circle of people and were not confined to the Applicant. Hence, the Tribunal does not consider it appropriate that the Applicant's personnel file should contain any reference to the Applicant's actions as having brought the Respondent into disrepute with the host government.

V. In respect of the charges brought against him, the Applicant offers some explanation for his actions. He contends that they were guided by the common practice of "quota swapping", and of the retroactive approval of requests. He further maintains that his

actions were necessitated by the special requirements he had for alcohol, cigarettes, etc., for social occasions he was organizing. Despite the evidence he submits in support of his contentions, the Tribunal cannot accept, as justification for any proven wrong-doing on the part of the Applicant, his argument that other staff members could have been equally remiss in importing duty-free goods.

VI. The Applicant alleges that in at least one instance, he was not informed in a timely manner that disciplinary action against him was being contemplated. He also claims that his immediate supervisor (who was a member of the Importation Committee) adopted a hostile attitude towards him, even in the early stages of the investigation. The Tribunal notes that but for the co-operation between the Applicant and his wife, some of the wrong-doings which occurred might have been avoided. The record indicates that the Executive Secretary of ECLAC, who signed the internal approval forms for importation, relied on the Applicant's wife, who was both the shipping clerk and the secretary to the Importation Committee and trusted, without his own documentary verification, that the importation documentation presented to him by her for his signature, conformed to the internal approval forms. The evidence shows that the Applicant, far from being a victim of prejudice or of procedural and other flaws, benefited from the procedural laxity and the trust enjoyed by his wife.

VII. Finally, the Tribunal turns to consideration of whether the Respondent's decision to demote the Applicant to the first step of his prior grade, with a two-year deferment of eligibility for within-grade increment, which deviated from the milder recommendation of the JDC, was consistent with his discretionary powers. In Judgement No. 479: Caine (1990), the Tribunal held:

> "The Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to

determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact." (See also Judgements No. 424, Ying and No. 425, Bruzual)

In the present case, the Tribunal has not found any evidence to suggest that the Secretary-General was influenced by any prejudicial or extraneous factors. Once the Secretary-General decided, on the basis of such facts as were available to him, that the Applicant's conduct violated U.N. standards of integrity, he was free to decide what penalty under staff rule 110.3(a) would be appropriate.

VIII. In the light of the foregoing, the Tribunal

(i) Decides that the Respondent should remove from the Applicant's personnel file any conclusion that his action brought the Respondent into disrepute with the host Government.

(ii) Rejects all other pleas of the Applicant.

(Signatures)

Samar SEN
President

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 11 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary